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Supreme Court, U.S.
FILED

No. 07-46

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SUPREME COURT OF THE UNITED STATES

ANDRE LEGALE JENKINS,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

PETITION FOR CERTIORARI TO THE TEXAS COURT OF APPEALS TWELFTH DISTRICT, TYLER, TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should the Defendant's burdens of proof and going forward in a *Batson* hearing be affected by the Trial Court's Not Finding that the Race Neutral Explanations were Discriminatory, resulting from the totality of the voir dire's circumstances as effected by the Prosecution's explanations in relation to the case?

TABLE OF CONTENTS

Question Presented for Review.....i

Table of Contents.....ii

Table of Cited Authorities.....iii, iv

Opinion Below.....1

Jurisdiction.....1

Constitutional Provisions.....1

Statement of the Case.....2

Reasons for Allowance of the Writ.....3

Conclusion.....29

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION amend XIV, § 1.....1, 29

SUPREME COURT of the UNITED STATES OF AMERICA

Anderson v. Bessemer City, 470 U.S. 564, 573
105 S.Ct. 1504, 1511, 84 L.Ed.2d 518(1985).....26, 28

Batson v. Kentucky, 476 U.S. 79,
106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)
.....4, 6, 8, 18, 21, 23, 25, 26, 28

Lyons v. Oklahoma, 322 U.S. 596, 602-603,
64 S.Ct. 1208, 88 L.Ed. 1481 (1944).....21

Miller-El v. Dretke, 545 U.S. 231,
125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).
.....5, 6, 8, 9, 14, 22, 26

Mt. Healthy City Sch. Bd. of Educ. v. Doyle,
429 U.S. 274, 286-87, 97 S.Ct. 568, 574-76,
50 L.Ed.2d 471 (1977).....21

Nardone v. United States, 308 U.S. 338, 341
60 S.Ct. 266, 84 L.Ed. 307 (1939),.....21

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769,
131 L.Ed.2d 834 (1995).....22, 24, 25, 27, 28

Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248,
258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981).....25

Village of Arlington Heights vs. Metropolitan
Housing Development Corp., 429 U.S. 252, 270 n. 21,
97 S.Ct. 555, 566 n. 21, 50 L.Ed.2d 450 (1977).....21

SUPREME COURT of the UNITED STATES OF AMERICA

Wong Sun vs. United States, 371 U.S. 471,
83 S.Ct. 407, 9 L.Ed.2d 441 (1963).....21

RULES of the SUPREME COURT of the UNITED STATES

SUP. CT. R. 10 (c).....1

UNITED STATES CIRCUIT COURTS OF APPEAL

Howard v. Senkowski, 986 F.2d 24 (2d Cir. 1993).....21, 24

Kesser vs. Cambra, 465 F.3d 351 (9th Cir. 2006).....26, 27

UNITED STATES CODE, 28 U.S.C. 1257

.....1

STATE OF TEXAS CASE LAW

TEXAS COURTS OF APPEALS, Twelfth District, Tyler,
Jenkins vs. State, October 25, 2006.....7, 24, 25

TEXAS COURTS OF APPEALS, First District, Houston,
Thomas vs. State, Opinion of November 9, 2006.....22

TEXAS CODIFIED LAW

TEX. CODE CRIMINAL PROC. ANN. art. 35.261 (2007).
"Peremptory Challenges Based On Race Prohibited".....23

STATE LAW

Ex Parte Travis, 776 So.2d 874, 881 (Ala. 2000).....14

SECONDARY AUTHORITY

Black's Law Dictionary 642 (4th ed. Rev. 1972).....5

OPINION BELOW

The opinion of the Texas Court of Appeals, Twelfth District, Tyler, Texas, dated October 25, 2006, is located in the Appendix, pages 30-43.

JURISDICTION

The Petitioner's Appeal to the Texas Court of Appeals, Twelfth District, was Affirmed on October 25, 2006. The Court of Criminal Appeals of Texas refused the Petitioner's State Petition for Discretionary Review on March 7, 2007. It appears the jurisdiction of The Supreme Court of the United States of America may be conferred pursuant to 28 U.S.C. 1257; *see* SUP. CT. R. 10 (c).

CONSTITUTIONAL PROVISION

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Insidious jury discrimination marked this voir dire from the first venire person to the last stricken African American. State slant through venire misquotes, coupling of final juror responses as a veil to misquote without stating the actual words of the final juror and inadequate, suspended questioning are just the preface. This lack of inquiry on the chosen question of rehabilitation vs. punishment in sentencing, resulted in an underdeveloped rationale, mischaracterization, elaboration and relentless exaggeration. The suspended questions for black venire persons, compared to indulgent patience with non-black final jurors, set up repetitive misrepresentation becoming invasive argument in the *Batson* discussion, all of which took place side bar in front of the venire panel after five o'clock. There was no apparent Step Three analysis from the totality of the circumstances, nor any finding of purposeful discrimination by the Trial Court, rather repeated findings regarding race neural reasons, while additional reasons were added as argued by the prosecutor during said findings. The Court used the additional reasons to supplement its findings for race neutral reasons. The defense attorney argued that three final jurors "placed just as great amount of emphasis on rehabilitation as the African American jurors did, and that's my recollection.". The Court repeatedly offered to have the Reporter read back some of the responses, though opining that it had enough to make a ruling. The defense responded that there were vast differences between the State and the defense in their recollections. The Trial Court appeared closest to finding purposeful discrimination when it found that the questioned challenges were based on reasons totally unrelated to the race of the stricken four citizens, in that the reasons proffered were clearly race neutral. The Appellate Court, standing on deferential standard, issued few observations based on the total record, inductive to the issues, while affirming the conviction.

Four African Americans were on the venire panel[1] in this aggravated assault, aggravated robbery and burglary prosecution of Andre Legale Jenkins, an African American.[2] Totality of circumstances reveal invasive jury discrimination beginning and ending[3] with all four black citizens peremptorily

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[1] (2 Rptr. Rec. pg. 133, *lines 13 – 22*).

[2] (6 Rptr.Rec.State's Ex.# 43, pgs.1-5), photo id, name, black male, d.o.b. 07-17-79; notarized, admitted evidence; 4 Rptr.Rec. pg. 176-7; (6 Rptr.Rec. State's Ex. # 45, pgs. 3-5), (6 Rptr.Rec. State's Ex. # 46, pgs. 3-5), (6 Rptr.Rec. State's Ex. # 47, pgs. 3-5), (6 Rptr. Rec.State's Ex. #48, pgs.3-5), (6 Rptr.Rec. State's Ex.#49, pgs. 1,3,4), (6 Rptr.Rec.State's Ex. #51, pg. 5).

[3] For organizational purposes through two preserved bases, both centered on responses to the State's question: which is more important in sentencing, Rehabilitation or Punishment? The **first basis** is that black venire person Mr. Ryder, number eight, chose *rehabilitation*, which applies to final jurors Ms. Atwood, number two, and Ms. Davis, number four, because they indicated that *rehabilitation* was a factor in their consideration. (2 Rptr. Rec. pg.132, *lines 5 – 11*). The **second basis** is that stricken black venire persons Mr. Wallace, number fifteen and Ms. Allen, number nineteen, did not choose rehabilitation; and along with Ms. Reed-Towels, number eleven, were just as *uncertain* in their responses to the State's question as Mr. Stephenson, final juror number three, as well as Ms. Brewster, final juror number six, specifically, before a second question by the State. (2 Rptr. Rec. pg.132, *lines 11 – 19*). Ms. Brewster was the first final juror mentioned by the defense, specifically that she did not know which way she would go, probation or rehabilitation. (2 Rptr. Rec. pg. 127, *line 24* through pg. 128, *line 6*). Although the State was correct, that Ms. Brewster, final juror number six, did choose punishment, the totality of the circumstances include the voir dire participation of Ms. Brewster as part of the jury discrimination. Secondly, it is possible that Ms. Allen, stricken black juror number nineteen, could have been stricken because of a race neutral reason, but was included with Mr. Wallace as a rehabilitation challenge.

Capsulized in order of presentation, the dual bases are as follows:

1.) black venire person number eight ("rehab") compared to final jurors four and two, who also considered *rehabilitation* (8 vs. 4 & 2); and

2.) black venire persons eleven, fifteen and nineteen did not choose rehabilitation and were just as *uncertain* as, and will be compared to the same three final jurors two, three and four (11,15,19 vs. 6 & 3). Eight Americans were personally involved, and all others were witnesses.

struck from participating in jury service.[4] The salient question during the State's voir dire was whether the venire persons thought it was "more important" in sentencing to rehabilitate somebody, changing their behavior, or to punish somebody for what they had done.[5] Stricken black venire member number eight, Mr. Ryder, answered, "rehab."[6] The State's reason for striking Mr. Ryder was because he indicated that rehabilitation was the most important aspect of sentencing.[7] Final juror number four, Ms. Davis, had answered, "I think it completely depends on the situation, and I just - - I guess I would have to go with punishment in the end, but I'd rather go with rehabilitation first."[8] The prosecutor responded to the *Batson*[9] motion, arguing that final juror number four, Ms. Davis "said that punishment was an essential part" of her answer, having coupled her with preceding final juror number three.[10] Using the word "essential" to effect difference, the prosecutor quoted her as saying his words, disguised by the coupling.[10] It

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[4] There were three stricken black venire persons initially: Mr. Ryder, number 8; Mr. Wallace, number 15 and Ms. Allen, number 19. (2 Rptr. Rec. pg. 126, *lines 8 – 13*). A minute later, a fourth stricken black venire person was added to the motion, Ms. Reed-Towels, number 11. (2 Rptr. Rec. pg. 129, *lines 4 & 5*).

[5] "I want to ask y'all if you think it's more important or - - which is more important - - excuse me - - to rehabilitate somebody, to get them to change their behavior, or to punish somebody for what they did." (2 Rptr.Rec. pg. 54, *lines 21 – 24*).

[6] "MR. MURPHY: Juror # 8?
VENIRE PERSON RYDER: Rehab. (2 Rptr. Rec. pg. 57, *lines 10-11*).

[7] "MR. MURPHY: I have my reasons right now, yes sir.
THE COURT: Go ahead.
MR. MURPHY: Juror number 8 was struck because he is rehab, as far as punishment, deterrence, or rehabilitation. Juror number 8 indicated that he - - the most important aspect of sentencing somebody would be rehabilitation. (2 Rptr. Rec. pg. 126, *line 25* through pg. 127, *line 7*).

[8] (2 Rptr. Rec. pg. 56, *lines 8 - 13*).

[9] Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[10] The prosecutor coupled final jurors 3 and 4 together,... [continued pg. 5]

appears to be a mischaracterization of final juror, Ms. Davis' response.[11] Punishment was not an "'essential" part' of Ms. Davis' actual answer; not indispensable to her preference, nor of the "highest degree."[12] Ms. Davis simply answered the question posed by the State (which is more important to you in sentencing?) by concluding that she would "rather go with rehabilitation first." The prosecutor did not question Ms. Davis further, concerning her preference for rehabilitation after this single response.[13] Ms. Davis was of like mind with the venire, not knowing anything about the case, having to commit to the most important, thinking, "it completely depends on the situation."[14] She hesitated, "and I just - - I guess I would have to go with punishment in the end, but . . .." The State repeated this Sentencing Choice question five times before reaching Ms.

[fn. 10 continued]...stating, "Juror Numbers 3 and 4 each said that punishment was an essential part of their answers." (2 Rptr. Rec. pg. 132, *line 25* through pg. 133, *line 2*). Actually, final juror number 3 said both at the same time, and final juror number 4 would rather go with rehabilitation first.

MR. MURPHY: **Juror Number 3**, what about you?

VENIRE PERSON STEPHENSON: I believe if they're being rehabilitated, but being punished at the same time, both of them.

MR. MURPHY: **Juror Number 4**, what about you?

VENIRE PERSON DAVIS: I think it completely depends on the situation, and I just - - I guess I would have to go with punishment in the end, but I'd rather go with rehabilitation first. (2 Rptr. Rec. pg. 56, *lines 3-13*).

[11] Miller-El v. Dretke, 545 U.S. 231, 244, 125 S.Ct. 2317, 2327, 162 L.Ed.2d 196 (2005).

[12] ESSENTIAL Indispensably necessary; Important in the highest degree; requisite. BLACK'S LAW DICTIONARY 642 (4th ed. Rev. 1972).

[13] Miller-El v. Dretke, 545 U.S. 231, 244-245, 125 S.Ct. 2317, 2327-28, 162 L.Ed.2d 196 (2005).

[14] This venire panel had difficulty with the sentencing question, especially the individually questioned first row of nine, where five of the first six venire persons responded initially "both" (#1 & #3), depending on the situation (#2 & 4), or needed to hear the case before deciding (#6), all five becoming final jurors. And venire persons 4 & 9 were "I guess I would have to" (2 Rptr. Rec. pg. 55, *line 9* through pg. 57, *line 14*).

Davis, final juror number four.[15] She was the only one of the first five final jurors from the first row, who answered the question with her first response.[16] The State chose this question and its responses, for its support of all four strikes of black citizens. The State's reason for striking black venire person number eight, Mr. Ryder answering "rehab," applies to final juror number four, Ms. Davis' preference, but I'd rather go with rehabilitation first (.)," " . . . tending to prove purposeful discrimination . . .."[17] This is the first of enumerable examples of the State responding to the final jurors in different ways and manner, than all four of the stricken black citizens, through comparative treatment.[18]

In step two of the *Batson* motion, the prosecutor reiterated to the Court that he struck every one who said they're rehabilitation.[19] The Honorable Court of Appeals conflated the responses of all three final jurors; numbers two, three and four, Ms. Atwood, Mr. Stephenson and Ms. Davis. All of their

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[15] After the initial question, it was repeated five more times before Ms. Davis, final juror four's response. (2 Rptr. Rec. pg. 54, *line 25* through pg. 56, *line 13*). Bridged from considering "...life in prison for this offense(?), to "an open mind for the full range of punishment," to a lot of different reasons to sentence somebody, the State asked, "I want to ask y'all if you think it's more important or - - which is more important - - excuse me - - to rehabilitate somebody, to get them to change their behavior, or to punish somebody for what they did," (2 Rptr.Rec. pg. 54, *lines 9 – 24*).

[16] (2 Rptr.Rec.pg. 55, *line 9 through* pg. 56, *line 25*).

[17] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005); *citing* Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[18] Miller-El v. Dretke, 545 U.S. 231, 244-245, 125 S.Ct. 2317, 2327-2328, 162 L.Ed.2d 196 (2005). The comparative treatment of these Eight Americans, four stricken and four jurors, is so revealing from this reporter's record, in the actual experience of April 4, 2005, "All are punished. All are punished." Miller-El, vs. Dretke, 545 U.S., *at 252*, 125 S.Ct., *at 2332*.

[19] "I struck everybody who said that they're rehabilitation, Judge." (2 Rptr.Rec. pg. 130, *lines 6 - 7*).

responses were distinguished as "less absolute" than stricken Mr. Ryder's "rehab."[20] The Honorable Court of Appeals did not compare the rehabilitation character of both the jurors and those stricken.[18] However, the Honorable Trial Court singled out "Number 4, other than just the reason given on rehabilitation." Whether or not it was a faux pas, the Court began explaining its reliance on additional reasons for denying the motion—thinking of rehabilitation.[21]

Final juror number two, Ms. Atwood's response: "Well, to me, it depends on the situation, but if rehab is not going to do the job, then punishment should be done."[22] It was conditional. However, the prosecutor spent several moments with her, patiently, reiterating, "(I)f you had to pick one, would you say - - rehabilitation and punishment, but which in your mind is the most important reason to sentence somebody?"[22] Then, during the *Batson* arguments, Mr. Murphy began his defense

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[20] Twelfth District Court of Appeals, Tyler, Texas; Appendix, page 35, *l.8.*

[21] "THE COURT: The Court will basically have to have the individual responses of several of these jurors read back that's on request of either party. I'll do that, but as I understood, **in regard to these jurors up here, who had other reasons given by Mr. Murphy on Number 4, other than just the reason given on rehabilitation.** MR. MURPHY: That's correct, Judge. THE COURT: Is that - - that's what I understood. MR, MURPHY: That's correct, Judge." Venireperson(sp) Number 1 and Number 2 were victims of burglary of habitations. Venireperson(sp) Number 3 talked about his brother having a DWI and treated very fairly by law enforcement, very fairly by the judicial system, emphasizing "very." And Juror Number 4, Ms. Davis, her husband has been on the jury before. THE COURT: Well, that's why the Court has said, in going through the findings the Court was making, that the Court had considered other reasons on these other jurors, which would include those that Mr. Davidson had raised where there were other reasons dictated or stated into the record by Mr. Murphy for reasons that he did not exercise peremptory challenges on those jurors. So the Court has - - the Court does overrule the Defense's motion for Batson - - MR. DAVIDSON: Thank you. THE COURT: - - based on the reasons stated by the Court. (End of Bench Conference.) (2 Rptr.Rec. pg.138, *line 16* through pg. 139, *line 22*).

[22] "MR. MURPHY: What about you, **Juror Number 2**? If you had to pick one, would you say - - as more important, knowing that you can use both rehabilitation and punishment, but which in your mind ... [continued pg. 8]

for not striking final jurors numbers two, three and four, by offering only an additional reason for not striking Ms. Atwood, final juror number two.[23] The State never made any responsive argument to the Petitioner's claim that "rehabilitation" was a factor considered by final juror number two, Ms. Atwood.[24] Ms. Atwood's condition of rehabilitation first, signaled a limit upon any concern for punishment, yet no further inquiry.[25]

[cont. fm. pg. 7] ... is the most important reason to sentence somebody?"
VENIRE PERSON ATWOOD: Which is the most important, rehab or - -
MR. MURPHY: Yes, ma'am.
VENIRE PERSON ATWOOD: Well, to me, it depends on the situation, but if rehab is not going to do the job, then punishment should be done. (2 Rptr.Rec.pg. 55, *line 17 through* pg. 56, *line 2*).

[23] "MR. DAVIDSON: . . . I just want the record to reflect that Jurors Number 2, 3, and 4 also indicated that rehabilitation would be a factor. My notes indicate that 2, 3, and 4 said that rehabilitation would be a factor in their consideration . . . Juror Number 11 was uncertain. My notes do not reflect that Number 15 or 19, either one, chose rehabilitation. I think they would fit in that uncertain category. And I believe Jurors 2, 3, and 4 were just as uncertain as Jurors 11, 15, and 19. That would be the basis for the Batson challenge. (2 Rptr.Rec. pg. 132, *line 4 - 19*). "THE COURT: What do you have on - - MR. MURPHY: If I may respond to that, Judge.
THE COURT: Yes, you may.
MR. MURPHY: **Juror Number 2 was also** a victim of a burglary of a habitation. Jurors Numbers 3 and 4 each said that punishment was an essential part of their answers. Also, Judge, Juror Number 4 was not struck. It's my understanding that her husband had previously served on a jury, was another reason we didn't strike Juror Number 4. Another reason that we didn't strike Juror Number 3 is, when asked about his brother's DWI, he responded he was treated very fairly by both law enforcement and the judicial system with an emphasis on 'very.' " (2 Rptr.Rec. pg. 132, *line 20*, through pg. 133, *line 11*).

[24] "MR. DAVIDSON: . . . I just want the record to reflect that Jurors Number 2, 3, and 4 also indicated that rehabilitation would be a factor. My notes indicate that 2, 3, and 4 said that rehabilitation would be a factor in their consideration . . . Juror Number 11 was uncertain. My notes do not reflect that Number 15 or 19, either one, chose rehabilitation. I think they would fit in that uncertain category. And I believe Jurors 2, 3, and 4 were just as uncertain as Jurors 11, 15, and 19. That would be the basis for the Batson challenge. (2 Rptr.Rec. pg. 132, *line 4 - 19*).

[25] Miller-El v. Dretke, 545 U.S., at 245. 125 S.Ct., at 2328.

Mr. Ryder, black "(J)uror number 8 was struck because he is rehab . . .."[26] This reason "applies" to "(W)ell, to me, it depends on the situation, but if rehab is not going to do the job, then punishment . . .(.),[27] albeit conditional. The immediate "pretextual timing" of the State defending its non strike of a "rehabilitation" final juror, with only an additional catchall reason, evinces animus.

The second basis of Petitioner's *Batson* motion is that final jurors, numbers " . . . 2, 3, and 4 were just as uncertain as Jurors 11, 15, and 19(.)" in their responses to this State question on sentencing. When the State finished the first row, it called on the second row, rephrasing: "There on the second row, who would feel that between punishment and rehabilitation, they would choose punishment as more important? . . . If you could just raise your cards."[28]

Ms. Reed-Towels, Mr. Wallace, and Ms. Allen, black venire persons numbers eleven, fifteen and nineteen did not

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[26] "MR. MURPHY: I have my reasons right now, yes sir.
THE COURT: Go ahead.
MR. MURPHY: Juror number 8 was struck because he is rehab, as far as punishment, deterrence, or rehabilitation. Juror number 8 indicated that he - - the most important aspect of sentencing somebody would be rehabilitation. (2 Rptr.Rec. pg. 126, *line 25* through pg. 127, *line 7*).

[27] "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed.2d 196 (2005).

[28] "MR. MURPHY: There on the second row, who would feel that between punishment and rehabilitation, they would choose punishment as more important? Anybody there on the second row? If you could just raise your cards. Jurors 10, 12, 14, 16, and 18, and 17 as well. Who thinks it would be rehabilitation as more important? Juror Number 13. Juror Number 11, which do you feel would be more important: Punishment or rehabilitation?
VENIRE PERSON REED-TOWELS: I would need more information to make a decision." [Footnote # 28 is continued on page 10.]

raise their cards intentionally.[28] The prosecutor had reiterated the State's sentencing question for three of the venire persons, and stopped after final juror six to repeat the instructions to the entire panel. After their juror number was called, all of the venire persons in the front row were greeted personally, sometimes with a question—except one. The last five venire persons, three through seven, were greeted personally by the prosecutor after he stated their venire number: "What about you?"[29] Not Mr. Ryder.[29] It may explain his abrupt answer!

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[28] [continued from page 9] ... "MR. MURPHY: And Juror Number 15, which do you think would be most important?
VENIRE PERSON WALLACE: Depending on what's the case, what he's charged with.
MR. MURPHY: Depending on the severity of the case?
VENIRE PERSON WALLACE: Yes.
MR. MURPHY: There on the third row, who would pick punishment as the most important reason to sentence somebody? Jurors Numbers 20, 21, 24, 25, and 26. Who would say the most important reason to assess a sentence is to rehabilitate somebody to change their behavior? Juror Number 27. Anybody else there on the third row?

Juror Number 19, do you feel that it would be more important for rehabilitation or for punishment?
VENIRE PERSON ALLEN: I say it all depends on his past history, whether he has had other offenses or whatever before I could decide. MR. MURPHY: See if he's had any other opportunities to change his behavior?
VENIRE PERSON ALLEN: Right. MR. MURPHY: What about there on the fourth row? . . ." (2 Rptr.Rec. pg. 57, *line 15* through pg. 59, *line 5*).

[29] "MR. MURPHY: Juror Number 1, do you feel that it would be to punish them or to rehabilitate them?
VENIRE PERSON STEWART: Well, it's hard to answer. It's both.
MR. MURPHY: Yes, ma'am, but if you had to pick one.
VENIRE PERSON STEWART: I would probably go for punishment.
MR. MURPHY: What about you, Juror Number 2? If you had to pick one, would you say - - as more important, knowing that you can use both rehabilitation and punishment, but which in your mind is the most important reason to sentence somebody?
VENIRE PERSON ATWOOD: Which is the most important, rehab or - -
MR. MURPHY: Yes, ma'am.
VENIRE PERSON ATWOOD: Well, to me, it depends on the situation, but if rehab is not going to do the job, then punishment should be done.

The prosecutor said, "Juror number eight." Mr. Ryder's responsed: "Rehab." Four words total.[29] The remaining three black venire persons refused to raise their numbers thereafter.

Next, "MR. MURPHY: . . . Juror Number 11, which do you feel would be more important: Punishment or rehabilitation?

VENIRE PERSON REED-TOWELS: I would need more information to make a decision.

MR. MURPHY: And Juror Number 15, which do you think would be most important?"[28]

Ms. Reed-Towels' response to the State's question was very similar to that of final juror number six, Ms. Brewster: "I would have to hear the case before I decided."
"I would need more information to make a decision (.)," answered Ms. Reed-Towels. The State responded to final

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[Footnote #29 continued from page 10]
"MR. MURPHY: Juror Number 3, what about you?
VENIRE PERSON STEPHENSON: I believe if they're being rehabilitated, but being punished at the same time, both of them.
MR. MURPHY: Juror Number 4, what about you?
VENIRE PERSON DAVIS: I think it completely depends on the situation, and I just - - I guess I would have to go with punishment in the end, but I'd rather go with rehabilitation first.
MR. MURPHY: Juror Number 5, what about you?
VENIRE PERSON NOWLIN: I would have to go with punishment.
MR. MURPHY: Juror Number 6, what about you?
VENIRE PERSON BREWSTER: I would have to hear the case before I decided.
MR. MURPHY: Which, though, do you think would be the most important, I mean, just as you're sitting here today?
VENIRE BREWSTER: Punishment."
MR. MURPHY: Obviously, you want to hear the case, but we can't do that yet. The rules won't let us talk about the case specifically. I know it's kind of hard to answer some of these questions without hearing the evidence in the case. We just can't do that until there's 12 of y'all selected. Juror Number 7, what about you?
VENIRE PERSON FERRELL: I would say punishment.
MR. MURPHY: Juror Number 8.
VENIRE PERSON RYDER: **Rehab.**" (2 Rptr.Rec. pg. 55, *line 9* through pg. 57, *line 11*).

juror number six, Ms. Brewster,[29] but not to Ms. Reed-Towels, stricken black venire person number eleven.[28]

"MR. MURPHY: "Which, though, do you think would be the most important, I mean, just as you're sitting here today?" VENIRE PERSON BREWSTER: Punishment."[29]

The State rephrased the question emphasizing "which" and without knowing anything—"just as your sitting here today."[29]

Yet, in argument to the Court during the *Batson* hearing: "MR. MURPHY: . . . And those jurors, as well as 11, and - - Juror Number 11, which I believe Mr. Davidson just said Juror Number 11 - - MR. DAVIDSON: Yes.
MR. MURPHY: - - didn't answer that question at all, and she eventually said she would need more information. She didn't have a position one way or the other, that she would need more information and couldn't answer that question until she got more information. That's why she was struck by the State."[30]

The State elaborated a second time:
"THE COURT: All right. Now, the basis on - -
MR. MURPHY: The basis on Juror Number 11 was that she said that she couldn't answer that question one-way or the other until she heard evidence. And so that's why - - even when explained to her that we couldn't get into evidence at this portion of the trial, at voir dire, she never did say one way or the other whether or not she thought it would be punishment or rehabilitation. She just never answered that question without saying, 'I just need more evidence.'
THE COURT: All right. And then in regard to Venire-person Number 6, who's on the jury - - "[31,32]

The State implied that it explained not being able to get into "evidence" to Ms. Reed-Towels personally. The explanation was given to the entire panel following Ms. Brewster, final juror number six. The difference between their answers is her, ". . . would have to hear the case . . ."[29] and Ms. Reed-Towels' " . . . would need more information . . ."[28] is that

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[30] (2 Rptr.Rec. 129, *lines 14 through 23*).
[31] (2 Rptr.Rec. pg. 131, *lines 3 through 16*).

the final juror's answer connotes "evidence." The prosecutor thrice used "evidence" to misrepresent Ms. Reed-Towels' "information," even quoting her. It must be more than irony when the prosecutor exaggerates and misrepresents her single, short statement as saying so much, when he left her so quickly after nine words.[32] Worse than cutting her off with: "(A)nd Juror Number 15...(,)" is the State's argument in support of her strike—"didn't," "couldn't," and "never" answered that question, using each negative twice!

Once again, the Trial Court was listening, immediately inquiring about Ms. Brewster, final juror number six, following the State's second argument for striking Ms. Reed-Towels—amazing, given that the Court had not asked for anything more on Juror Number 11.[31,32]

"THE COURT: All right. And then in regard to Venire-person Number 6, who's on the jury - - "[32]

Stricken black venire person number eleven, Ms. Reed-Towels was "otherwise-similar" to final juror number six, Ms. Brewster.[33] "[T]he State's failure to engage in any meaningful

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[32] The Court inquired about Venire Person 6, Ms. Brewster, immediately following the State's second argument for striking Ms. Reed-Towels, although it had not asked for anything more on Juror Number 11. "THE COURT: All right. And then in regard to Venire-person Number 6, who's on the jury - - " (2 Rptr.Rec. pg. 131, *lines 15-16*).

[33] Both Ms. Reed-Towels and final juror number 6, Brewster, were victims, friends or family of victims of any type of burglary. (2 Rptr.Rec. 40, *line 20* through pg. 41, *line 12*). However, Ms. Brewster was the only venire person who was called upon or answered, during the prosecutor's voir dire arguments for victims rights: MR. MURPHY: " . . . We've talked a lot about Mr. Jenkins' rights, right to subpoena people, right to bring up defenses, right to testify or not testify, whatever he feels is in his best interest. Do people think that victims should have certain rights in cases? Does anybody not think that victims should have rights? Who thinks the victims should have less rights than a defendant? Anybody? Who thinks that victims should have at least as many rights as a defendant? [next pg.] [fn. 33 cont.] "... If you'd just raise your cards. Who thinks that a victim should have more rights than a defendant? Juror Number 6. Because, Juror Number 6, would you agree with me that people don't go out and ask to be

voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination."[34]

Following the suspended question to Ms. Reed-Towels, when the prosecutor left her, the state posed the question to Mr. Wallace, black venire person number fifteen. "(A)nd Juror Number 15, which do you think would be most important?" Mr. Wallace answered, "(D)epending on what's the case, what he's charged with."[35] Understanding, the prosecutor asked: "Depending on the severity of the case?" "Yes," responded Mr. Wallace.[35] "There on the third row, who would pick punishment as the most important reason to sentence somebody?" The State suspended the questioning, just as the prosecutor had treated Ms. Reed-Towels. Yet again, the prosecutor responded to the *Batson* motion that Mr. Wallace, number fifteen, was struck based on his sentencing views, elaborating upon Mr. Wallace not raising his card signifying his choice of rehabilitation or punishment, that Mr. Wallace was "actually" called upon by the State, "while everybody else

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victimized for the most part.? VENIREPERSON BREWSTER: Yeah." (2 Rptr.Rec. pg. 51, *line 11* through pg. 52, *line 5*).

[34]Miller-El v. Dretke, 545 U.S. 231, 246, 125 S.Ct.2317, 2328, 162 L.Ed.2d 196 (2005), *quote*. Ex Parte Travis, 776 So.2d 874, 881 (Ala. 2000).

[35] "MR. MURPHY: . . . Juror Number 11, which do you feel would be more important: Punishment or rehabilitation?

VENIRE PERSON REED-TOWELS: I would need more information to make a decision.

"MR. MURPHY: And Juror Number 15, which do you think would be most important?

VENIRE PERSON WALLACE: Depending on what's the case, what he's charged with.

MR. MURPHY: Depending on the severity of the case?

VENIRE PERSON WALLACE: Yes.

MR. MURPHY: There on the third row, who would pick punishment as the most important reason to sentence somebody? (2 Rptr.Rec. pg. 57, *line 25* through pg. 58, *line 13*).

on that row raised their card," and his answer was "depending upon the circumstances,"[36] leaving out his response to the State's clarifying question.[35] The prosecutor added that he never gave an answer of punishment or rehabilitation as the most important reason in sentencing.[36]

A minute or so later, the prosecutor included number fifteen and number nineteen on the State's listing to the Court, identifying those venire persons who were struck because they were rehabilitation.[37]

Moments after, "THE COURT: Then in regard to 15? MR. MURPHY: With regard to 15, Judge, our records indicates (sp) rehabilitation, which is why he was struck."[38]

Mr. Wallace was not a rehabilitation juror. After he answered, "(D)epending on what's the case, what he's charged with," the State knew what Mr. Wallace was probably thinking. Although it was phrased for a yes or no answer, the State acquiesced by asking, "(D)epending on the severity of the

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[36] **1st argument** "Juror Number 15 was struck based on his views on actually sentencing. He was one who didn't initially raise his card and was actually - - he was actually called upon by the State, while everybody else on that row raised their card, and he was asked, "depending upon the circumstances," was his answer. He never gave an answer as to whether or not it was for punishment or rehabilitation, as far as the most import-ant portion - - or most important reason behind sentencing."
(2Rptr.Rec. pg. 127, *lines 12- 21*).

[37] **2nd argument** "MR. MURPHY: Judge, the State struck Juror Number 8 for her rehabilitation. Also, the State struck Juror Number 13 for the same reason, Juror Number 15 for the same reason, Juror Number 19 for the same reason, and Juror Number 27 for the same reason. (2 Rptr.Rec. pg. 129, *lines 9-13*).

[38] **3rd argument** (2 Rptr.Rec. pg. 129, *line 24 through* pg. 130, *line 2*). **Capsulized:** 1.) Mr. Wallace said "yes" answering the State's question: "Depending on the severity of the case?" 2.) The State first stated that he was struck based on his sentencing views. 3.) Then, the State quoted Mr. Wallace' answer as "depending upon the circumstances," misrepresenting his true response. 4.) "He never gave an answer as to whether or not it was for punishment or rehabilitation, . . ." 5.) The State " . . . struck number fifteen and number nineteen for rehabilitation." 6.) In seconds, records point to rehabilitation.

case?" Mr. Wallace said, "Yes."[35]

Mr. Wallace was able to affirm his concern with the State's words, "severity of the case." Prosecutors are looking for jurors concerned with severe charges when their case is aggravated robbery and aggravated assault, with a deadly weapon while burglarizing someone's home, where the defendant has enumerable priors, including a prior felony, as in this case.[39] Mr. Wallace was influenced a few minutes earlier, by the State reading and explaining the disjunctive indictment for the second, third and fourth times, utilizing the petitioner's name each time: "The way that this burglary of a habitation was indicted by the grand jury is that Mr. Jenkins intentionally or knowingly entered the house - - or excuse me - - committed the felony offenses of aggravated assault and aggravated robbery by entering the habitation, a house, . . ."[40] Mr. Wallace was the sole venire person to respond to this repetitive elaboration of the indictment, in Mr. Wallace's words— "(D)epending on what's the case, what he's charged with."

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[39] (6 Rptr.Rec. State's exhibits number 43 through 53).

[40] The above recitation was the first half of the disjunctive indictment. The State read the entire disjunctive indictment, repeatedly: "Burglary of a habitation occurs in many different ways. The way that this burglary of a habitation was indicted by the grand jury is that Mr. Jenkins intentionally or knowingly entered the house - - or excuse me - - committed the felony offenses of aggravated assault and aggravated robbery by entering the habitation, a house, without the effective consent of Salinda Evans, the owner thereof. . . . (objections and bench conference) . . . The indictment that was returned by the grand jury also says that Mr. Jenkins intentionally or knowingly entered a habitation without the effective consent of Salinda Evans, the owner thereof, and attempted to commit or committed the felony offenses of aggravated assault and aggravated robbery." This was the second time both of the disjunctive charges of the indictment were read to the venire panel, then the prosecutor explained what each of the paragraphs said, phrase by phrase, using the petitioner's name, and then the prosecutor read it again explaining what the State had to prove, using the petitioner's in each disjunctive paragraph, for the fourth time. (2 Rptr.Rec. pg. 33, *line 22 through* pg. 36, *line 15*). The first time the indictment was read by the Court. (2 Rptr.Rec. pg. 19, *line 5 through* pg. 20, *line 9*).

The third row resulted in six raising their cards, five more for punishment, and one for rehabilitation. Then, Ms. Allen, black venire person number nineteen, appeared—the third, consecutive black citizen whom the State had to call upon, and repeat the question. Ms. Allen responded: "I say it all depends on his past history, whether he has had other offenses or whatever before I could decide."[41] With knowledge of petitioner's record,[42] the prosecutor asked a second question, once again phrasing it for a yes or no response: "See if he's had any other opportunities to change his behavior?"[41] Ms. Allen answers, "Right." "What about . . .the fourth row?"[41] Additionally, Ms. Allen was familiar with Mrs. Marilyn Jenkins, the mother of the Petitioner, whom the State named as a state's witness, although she was only called by the defense.[43]

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[41] "MR. MURPHY: There on the third row, who would pick punishment as the most important reason to sentence somebody? Jurors Numbers 20, 21, 24, 25, and 26. Who would say the most important reason to assess a sentence is to rehabilitate somebody to change their behavior? Juror Number 27. Anybody else there on the third row?

Juror Number 19, do you feel that it would be more important for rehabilitation or for punishment?

VENIRE PERSON ALLEN: I say it all depends on his past history, whether he has had other offenses or whatever before I could decide. MR. MURPHY: See if he's had any other opportunities to change his behavior?

VENIRE PERSON ALLEN: Right.

MR. MURPHY: What about there on the fourth row?" (2 Rptr.Rec. pg. 58, *line 11* through pg. 59, *line 4 - 5*).

[42] Twenty-four years old when convicted, Petitioner had nine prior misdemeanors, and one state jail felony, punishable from 180 days to two years: (3 possession marij. under two oz., 2 viols. protective order-wife, 1 crim. trespass, 1 assault family-wife, and then one episode of driving while license suspended with evading arrest while children in vehicle [state jail felony for endangerment of his children]) (6 Rptr.Rec. State's exhibits number 43 through 53).

[43] Ms. Allen was initially struck because she was familiar with Marilyn Jenkins (a witness, as well as the mother of Petitioner), because Ms. Allens' daughter's grandson is in that family. (2 Rptr.Rec. pg. 28, *line 12* through pg. 29, *line 4*); (2 Rptr.Rec. pg. 127, *line 8-11*). However, the State argued repeatedly that Ms. Allen was struck because she was rehabilitation. (2

All three of these black venire persons were seated on rows two and three, but were questioned one right after another because not one raised their card for "punishment" or for "rehabilitation." Only six of the nine venire persons on the third row raised their cards. Ms. Allen was the only one that the State spoke to individually,[41] and the last venire person to whom the State spoke regarding rehabilitation and punishment in sentencing. Venire persons twenty two and twenty three, seated a few places away, never raised their cards, and were never asked their preference. They were left by the prosecutor after he questioned final black venire person number nineteen, Ms. Allen—with more than one-third of the strike zone of thirty four remaining.[44]

Rptr.Rec. pg. 129, *line 9-13*); (2 Rptr.Rec. pg. 130, *line 6* through pg. 131, *line 2*). It evolved into an additional reason, where "familiarity with" became she "knew" Marilyn Jenkins, though it was never established by the State during voir dire. (2 Rptr.Rec. pg. 28, *line 12* through pg. 29, *line 4*).

[44] (2 Rptr.Rec. pg. 124, *lines 16 -19*). It is also possible Ms. Allen, stricken black juror number nineteen, could have been stricken because of a race neutral reason. The State read a list of witnesses that the State anticipated calling, then asked; "(I)s anybody familiar with any of those people whose name I just read off? Ms. Allen responded to the State's general question. After Ms. Allen raised her card, she responded to the State's question: "(W)ho are you familiar with?" Ms. Allen answered, "Marilyn Jenkins." (2 Rptr.Rec. pg. 27, *line 24* through pg. 29, *line 4*). The State initially argued that, "Juror Number 19 was struck because she knows one of the witnesses who is actually related to the defendant, who the State anticipates will be a witness in this case." (2 Rptr.Rec. pg. 127, *line 8-11*). However, the State argued repeatedly that Ms. Allen was struck because she was rehabilitation. (2 Rptr.Rec. pg. 129, *line 9-13*); (2 Rptr.Rec. pg. 130, *line 6* through pg. 131, *line 2*). The initial argument that Ms. Allen "knows" one of the witnesses evolved into an additional reason, where it became "she knows Marilyn Jenkins, who is related to the defendant in this case." It was never clarified nor established during voir dire, that it was anything more than being familiar with Marilyn Jenkins because Ms. Allen's daughter's grandson was in that family. Ms. Allen was not familiar with Marilyn

The response of Mr. Stephenson, final juror number three, is the mite for the answers of the last three black venire persons, each alleged to have never answered the State's question. "I believe if they're being rehabilitated, but being punished at the same time, both of them."[29] Recall it was argued that punishment was "essential" to Mr. Stephenson's answer of both being equal. It appears that Ms. Reed-Towels' "never," "couldn't" and "didn't" compares very well with Mr. Stephenson, or in the defense's word—uncertain. This surmise from never having answered, applies to Ms. Allen and Mr. Wallace as well. While remindful of "proffered reason(s) for striking a black panelist" applying "just as well to an otherwise-similar non black who is permitted to serve," the lack of inquiry on this State sentencing question evinces methodic pretext.

The State's *Batson* response to final jurors numbers two, three and four, begins and ends with additional reasons.[45] Instead of arguing Ms. Atwood's answer as a punishment response, the prosecutor chose to add "any facially neutral"

[fn. 44, pg. 18, cont]...Jenkins' son, Andre Legale Jenkins, the Petitioner. (2 Rptr.Rec. pg. 28, *line 12* thru pg. 29, *line 4*). If Ms. Allen knew Marilyn Jenkins, she would probably have been familiar with her son's name, or the fact he had been indicted and awaiting trial in jail. This familiarity of Ms. Allen with Ms. Jenkins was never clarified, and Ms. Jenkins was never called by the State as a witness. During testimony on the merits, Marilyn Jenkins was called by Petitioner and testified that she lived in Tyler all of her life, that she had four children and that the Petitioner, Andre Legale Jenkins, was one of her four children and had raised him since he was a child. (4 Rptr.Rec. pg. 80, *line 13* through pg. 82 , *line 15*).

[45] In between the additional reasons, the State's words for not striking the coupling of final jurors numbers four with three, were "punishment was an essential part of their answers."(2 Rptr.Rec. pg.132, *ln 25 thru* pg.133,*ln 2*).

catchall question—that juror number two, Ms. Atwood, was "also was a victim of a burglary of a habitation."[46] As described in the State's introduction, it could have been one of her friends, a family member, or herself, involved in any sort of burglary.[47] The prosecutor closed his *Batson* arguments with additional reasons for not striking final juror number four, Ms. Davis and final juror number three, Mr. Stephenson, in that order. Ms. Davis' husband had served previously on a jury, and was the additional reason for not striking her.[48] The State never argued that this additional reason regarding the husband's prior jury service was anything more than it appears.[49] The prosecutor never argued the merits of any of the additional reasons as "motivating factors," or that the state would have acted identically in not striking Ms. Atwood

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[46] (2 Rptr.Rec. 132, *lines 24 - 25*).

[47] "Who here, either themselves, a friend, or a family member has ever been the victim of a burglary of a habitation? Anybody? Juror Numbers, if you would just hold your card up real quick. Jurors Numbers 1,2,6,21,28,29,11,33,23,37. Juror Number 9? VENIREPERSON POWELL: Premises? MR. MURPHY: Yes, any sort of burglary. Okay. Y'all go ahead and put your cards - - oh, I'm sorry. And Juror Number 47 as well. For those of y'all who have been victims of burglary of a habitation or a building or premises, anything like that, would you be able to listen to the facts in this case and this case alone and base your verdict only on the facts in this case alone? Is there anybody who wouldn't be able to do that?" (2Rptr.Rec.40, *line 20* thru pg. 41, *line 12*).

[48] "Also, Judge, Juror Number 4 was not struck. It's my understanding that her husband had previously served on a jury, was another reason we didn't strike Juror Number 4." (2 Rptr.Rec. pg. 133, *lines 3 – 6*).

[49] It was either juror card information, trial preparation by the State in this small county, or government jury service computer records—non record information, because the subject of previous jury service of spouses was not part of the reporter's record of voir dire.(2 Rptr.Rec. pg. 8, *line 21* through pg. 147, *line 9*).

as a victim of any burglary, regardless of her conditional preference for rehabilitation, absent racial reason.[50]

The State exaggerated its additional reason for final juror number three, Mr. Stephenson: "(A)nother reason that we didn't strike Juror Number 3 is, when asked about his brother's DWI, he responded he was treated very fairly by both law enforcement and the judicial system with an emphasis on 'very.'"[51] It was Mr. Stephenson's brother-in-law's DWI conviction, and he answered "Yes" to the question if his brother-in-law was treated fairly by the judicial system, answering "very fair" as to law enforcement only.[52] The above additional reasons were repeated by the State as the Honorable Trial Court was announcing its reliance on additional reasons as part of the denial of the *Batson* motion,[53] after the faux pas.

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[50] Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274, 286-87, 97 S.Ct. 568, 574-76, 50 L.Ed.2d 471 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 270 n. 21, 97 S.Ct. 555, 566 n. 21, 50 L.Ed.2d 450 (1977). Cited in *Howard v. Senkowski*, 986 F.2d 24, 26-27 (2d Cir. 1993), the Supreme Court in *Mt. Healthy* and *Arlington Heights* cited the other case reciprocally in 1977 to further extend or institute the appropriate test for conduct that is initially shown by a claimant to be constitutionally protected: where a substantial cause or reason or "motivating factor" for the conduct exists. The actor should be required to prove by a preponderance of the evidence that it would have acted in the same manner, even in the absence of the constitutionally protected conduct. Originating in *Lyons v. Oklahoma*, 322 U.S. 596, 602-603, 64 S.Ct. 1208, 88 L.Ed. 1481 (1944), rooted in *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) with Constitutional lore from *Nardone v. United States*, 308 U.S. 338, 341 (1939), it was applied in *Wong Sun* where a confession occurring several days after an illegal arrest, was "so attenuated as to dissipate the taint." Wong Sun, 371 U.S., at 491; Nardone, 308 U.S., at 341.

[51] (2 Rptr.Rec. pg. 133, *lines 7–11*).

[52] (2 Rptr.Rec. pg. 61, *lines 1 through 12*);

[53] Subsequent to the Court's original denial of the defendant's *Batson* motion, defense counsel brought up the discrepancies falling either way, based upon the answers during the voir dire itself. (2 Rptr.Rec. pg. 136, *lines 8 - 14*). The Court reiterated its ruling on its findings that the State's exercise of its peremptory challenges were race-neutral and based on the

There is no Texas case law that addresses the question presented for review, nor involves the degree of totality of circumstances evinced in *Miller-El vs. Dretke*. The only case decided in Texas since the decision of *Miller-El vs. Dretke*, issued on June 13, 2005, is *Thomas v. State*, 110906 TXCA1, 01-05-00612. The Houston Court of Appeals, First District, in a case where six of seven African American venire persons were peremptorily struck, considered a single race neutral reason given for one black venire person—she was a victim of

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[Fn. 53, pg. 21, cont] ...statements made by the State and the Defense, but that if anyone wanted to request that a response of a venire person be read back, the Court can do that. (2 Rptr.Rec. pg. 136, *line 15* through pg. 137, *line 11*). Defense counsel responded that the recollections by the State and the Defense of the responses from final jurors numbers 2, 3 and 4 were vastly different, and that these three final jurors "placed just as great amount of emphasis on rehabilitation as the African-American jurors did, and that's my recollection." (2 Rptr.Rec. pg. 137, *lines 12 - 25*). "THE COURT: The Court will basically have to have the individual responses of several of these jurors read back that's on request of either party. I'll do that, but as I understood, in regard to these jurors up here, who had other reasons given by Mr. Murphy on Number 4, other than just the reason given on rehabilitation. MR. MURPHY: That's correct, Judge. THE COURT: Is that - - that's what I understood. MR. MURPHY: That's correct, Judge." Venireperson(sp) Number 1 and Number 2 were victims of burglary of habitations. Venireperson(sp) Number 3 talked about his brother having a DWI and treated very fairly by law enforcement, very fairly by the judicial system, emphasizing "very." And Juror Number 4, Ms. Davis, her husband has been on the jury before. THE COURT: Well, that's why the Court has said, in going through the findings the Court was making, that the Court had considered other reasons on these other jurors, which would include those that Mr. Davidson had raised where there were other reasons dictated or stated into the record by Mr. Murphy for reasons that he did not exercise peremptory challenges on those jurors. So the Court has - - the Court does overrule the Defense's motion for Batson - - MR. DAVIDSON: Thank you. THE COURT: - - based on the reasons stated by the Court. (End of Bench Conference.) THE COURT; Ladies and Gentlemen, I'm now going to able to call out the names of the 12 of you who have been selected to serve on this jury. (2 Rptr.Rec. pg.138, *line 16* through pg. 139, *line 25*).

a crime. It was not an additional reason, and the record showed that the non-African-American venire persons who were also crime victims were not struck by the State. The Houston Court of Appeals held that it was disparate treatment, and the Trial Court's finding of no racial discrimination was clearly erroneous.

The Texas statute which codifies *Batson vs. Kentucky* is entitled, "Peremptory Challenges Based On Race Prohibited." TEX. CODE CRIMINAL PROC. ANN. art. 35.261 (2007). In its last two lines, it states, "(I)f the defendant establishes a prima facie case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination."

In the Honorable Trial Court's entire ruling, there is no finding addressing discriminatory purpose or intent. The Trial Court's language in its opinion denying the *Batson* motion does not indicate consideration, or weighing of the State's sincerity, or degree of belief, or motivation in its reasons expressed.[55] It cannot be inferred from its language that states: "The Court considering all of the statements by Mr. Murphy to the Court finds that his peremptory challenges exercised on those four venirepersons [sic] were based on reasons totally unrelated to the race of the venirepersons [sic], in that the reasons he stated for his exercise of the peremptory challenges on those four venire persons were, in the Court's view, in consideration of the entire record before the Court clearly race neutral."[56] The finding states the reasons were unrelated because they were race neutral. The Honorable Court did consider all of the reasons proffered for the non challenges of final jurors, found to be race neutral.[57] The Trial Court

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[55] (2 Reptr. Rec. pg. 133, *line 24 through* pg. 139, *line 25*).

[56] (2 Rptr.Rec. pg.134, *lines 13 - 21*).

[57] (2 Rptr.Rec. pg.134, *line 22* through pg. 135, *line 8*).

specifically considered reasons proffered by the State regarding those venire persons who became final jurors, raised in the motion by Petitioner.[58] And, as Petitioner has footnoted, the Honorable Court based his findings of race neutrality in part because of additional reasons from the State, recited herein,[56] with no ruling as to discrimination.

The Honorable Court of Appeals, Twelfth District, did not issue any statement, nor holding regarding an analysis or decision resulting from a finding of discrimination or pretext or lack thereof. In addition to conflating the responses on sentencing of three of the final jurors as "less absolute" than Mr. Ryder's "rehab," the Court of Appeals added that each juror discussed the merits of punishment. Finally, the Honorable Twelfth Court of Appeals opined that the additional reasons were insightful to the State's evaluation of the venire and were additional neutral explanations for striking Mr. Ryder, while not challenging final jurors two, three and four. Then, the Honorable Court of Appeals affirmed the decision to overrule the Batson motion, on the deferential bases of not being clearly erroneous error.

It is this basis of additional reasons from the Honorable Texas Courts that was the closest to holding discrimination, conducive to analysis of dual or mixed motive, save the arguably weak additional reasons tendered by the State. It appeared the reasons conveyed more pretext through timing than a defense which could maintain the burden still with the State, as originally held in *Howard vs. Senkowski.*[59]

More akin to this straightforward case is *Purkett v. Elem.*[60] The Supreme Court held that the Circuit Court of Appeals in granting a habeas case, "did not conclude or even attempt to conclude . . ." from the record, that there was no racial motive.[61] The Trial Court in *Purkett*, without explanation as in

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[58] (2 Rptr.Rec. pg.135, *line 9* through *line 22*).

[59] Howard v. Senkowski, 986 F.2d 24, 26 - 30 (2nd Cir. 1993).

[60] Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

[61] Purkett v. Elem, 514 U.S. 765, at 769.

Petitioner's case, overruled the motion, but did find discriminatory intent. Said finding, whether right or wrong, may not have been supported by the record.[62]

The Trial Court in Petitioner's case never found discrimination, although the Court offered to have any venire response read back by the reporter. The Honorable Court of Appeals did not appear to conclude much more from Petitioner's record. In this voir dire the prosecutor's suspended questions for black jurors compared to the patient indulgence of the white final jurors is unequal and no less disparate than the similarity of the final jurors' preference for rehabilitation in their responses. The fact that it was more apparent in the beginning rather than later, when the State bypassed the last third of the strike zone is because it was premised on just a few venire persons, all that is necessary where the intended strikes are in the front half of the strike zone. In combination with the revelation from the Reporter's Record that at the time the Court heard these additional reasons, joined as an additional basis for its finding of race neutrality, it was after five o'clock in the evening, at the bench with the venire panel seated in the court room, without recess for the duration of said hearing.[63] This hearing began

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[62] Purkett v. Elem, 514 U.S. 765, at 766

[63] The apologetic Court thought it would be underway by 1:30 p.m., but had "some matters that had to be taken up prior to the time that we could bring you up for individual voir dire." (2 Rptr. Rec. pg. 9, *lines 7-13*). Further, the Court mentioned that the instructions cover situations where voir dire can run over to the next morning. The Court stated twice, that: "we will," and "(J)ury selection in this case will be finished up this afternoon." (2 Rptr. Rec. pg. 11, *lines 11 – 21*). The venire was excused at 4:15 p.m. to be brought back up at 4:45 p.m. (2 Rptr .Rec. pg. 106, *lines 21* through pg. 107, *line 3*). The officers of the Court conducted challenges for cause on three venire persons approximately ten minutes, recessed for challenges. (2 Rptr. Rec. pg. 106, *line 13* through pg. 124, *line 21*). After recess, the venire entered the Courtroom, in Open Court, Petitioner-Defendant and venire present. At the bench, on the record, the *Batson* motion was heard side bar, wherein during the beginning discussion the Court stated they would try to do this at the bench at *line 16-17*, pg. 126. (2 Rptr. Rec. pg. 124, *line 22* through pg. 142, *line 14*). When the venire left the Court room,

with State slant, supported by underdeveloped questioning—coupling of final juror responses by web of misquote, as a veil over the actual words of final juror Four, Ms. Davis. Relentless, repetitive elaboration exposing weak rationale, failed the State. Inadequate questioning marred the entire voir dire. The prosecutor was succinct throughout, especially with this most important question for the State. But he was more curt, less indulgent or patient with each of these four black venire persons. He had to call on these citizens, after slight.

The recent *Kesser vs. Cambra,* 465 F.3d 351 (9th Cir. 2006) (en banc) (granting habeas relief on a *Batson* claim because the State Court decision resulted from unreasonable determination of the facts) is similar. The Federal Circuit Court focused on the bases of *Batson vs. Kentucky* and *Miller-El vs. Dretke. Batson vs. Kentucky* states that a "trial court then will have the duty to determine if the defendant has established purposeful discrimination," with its footnote that "a finding of intentional discrimination is a finding of fact."[64] The United States Court of Appeals, Ninth Circuit,[65] based on the totality of enumerable evidentiary facts not in favor of the State, held that the Trial Court did not "evaluate the sincerity of the prosecutor's non racial reasons" evinced by not finding animus inducing any analysis or thought. In the beginning of the opinion, following the quote from the Trial Court in California, the Ninth Circuit Court of Appeals distinguished stricken Native American Ms. Rindels working for a tribal entity from her membership or shared culture with Native

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the jury remained. (2 Rptr. Rec. pg.142 *line 15* through pg. 147, *line 9*).

[64] Batson v. Kentucky, 476 U.S. 79, 98 n.21, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *citing Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

[65] Having no jump pages, Petitioner will relate from the beginning of the opinion forward. The Ninth Circuit appears to place the totality of circumstances at the level of appellate courts, possibly extending *Batson vs. Kentucky* and *Miller-El vs. Dretke*. *Kesser*, end of section II.

Americans. The Court of Appeals also separated her personal, subjective characteristics from stereotypical leanings towards anti-establishment. The State prosecutor offered several bad, horrific racial reasons concerning Native Americans. The Trial Court failed to issue any findings on the State's sincerity or its motivating explanations. Acknowledging no findings, the State Court of Appeals stood on deferential grounds that Trial Judges can discern reality from excuses, even though the Court was concerned with the related anti-establishment insult being definitely stereotypical. The California Court of Appeals approved the genuine, non racial reasons as dominant over the racial stereotyping—"powerfully," with "solid" reasons. Having eventually reached the Federal Court of Appeals, the Ninth Circuit reversed because racial animus was clearly shown by the prosecutor's racial and cultural statements, such as describing Ms. Rindels as "darker skinned," believing in the cultural worth of their tribe, rather than "mainstream" America, resistive to criminal justice, etc. The Ninth Circuit held that the California Court of Appeals had a duty to determine whether the prosecutor's motives to strike Ms. Rindels and several others with similar slurs were pretextual. The Ninth Circuit Court stated that the Appeals Court had not reviewed the record of the voir dire, rather reviewing the State's neutral reasons only. By failing to review this comparative evidence, the State Court had unreasonably decided the case, having the duty to perform a step three analysis knowing that the Trial Court failed in that regard. *Kesser vs. Cambra* may shed light on Petitioner's case because the dissent argued that the defendant failed to offer a comparative analysis, through development of the facts of the voir dire at the third stage. The majority countered that since the Trial Court did not find any race based reasons at the second step, the Court never determined whether the race neutral reasons were pretextual, similar to the confusion of the lower Courts, addressed in *Purkett v. Elem.*

The statement of *Batson v. Kentucky*, that "(T)he prosecutor therefore must articulate a neutral explanation related to the particular case to be tried,"[66] may be the base introduction to the tripartite strength of whether or not these explanations are dutifully determined by the Trial Judge to establish purposeful discrimination as proven by defendant.[67] The crucial third base appears to be footnote 21, instructing that findings by trial judges evaluating credibility are entitled to deference by a reviewing court, ordinarily.[67] Reviewing all of the explanations proffered within the totality of the circumstances, the Court (or Appellate Court depending upon the normalcy of these total circumstances) shall decide finally, in the third step, whether or not the opponent of the questioned challenges has proven by a preponderance of the evidence that the explanations evince "purposeful racial discrimination."[68] The Petitioner argued his recollections of the venire responses were vastly different, that the stricken citizens were no more of rehabilitation mind than the final citizen jurors. Given the total circumstances of the Honorable Trial Judge's courtroom this early evening, what more could the defense have offered in front of a jury looking at their watch. There was no such finding of fact in this case, because there was little analysis as a result of the State's lack of inquiry throughout. Although it should be the opponent of the challenge who brings the issue to be decided by our Honorable Courts, it should not be an absolute maxim, dictating the burdens of proof and going forward with the evidence in an abnormal case. None of the explanations proffered by the State regarding Mr. Wallace, venire person number fifteen, were legitimate. Mr. Wallace never said, "depending on the circumstances." "(D)epending

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[66] Batson v. Kentucky, 476 U.S. 79, 98 n.20, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *citing* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981).

[67] Batson v. Kentucky, 476 U.S. 79, 98 n.21, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *citing Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). [68] Purkett v. Elem, 514 U.S. 765, 767-768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

on what's the case, what he's charged with." The State did not forget its follow up question to Mr. Wallace's true answer. "Depending on the severity of the case?" The prosecutor did not forget this American's response to this yes or no question, nor the yes or no question he posed to Ms. Allen seconds later. Nor did the prosecutor believe Mr. Wallace "was" rehabilitation, just as this citizen's indicated focus on the severity of crime could not have related to rehabilitation by any stretch, not in an aggravated assault, aggravated robbery while burglarizing a residence. These race neutral reasons appear to be misrepresentations given the totality of the circumstances. The reasons without explanations proffered for two of the other three challenges are similarly unrelated and mischaracterized in the prosecutorial mode delineated herein. Deferential affirmation is not warranted; a decision upon the totality of the circumstances is requisite for Petitioner's enjoyment of equal protection of the law.

In conclusion, Petitioner pleads that discrimination is inherent in the State's race neutral reasons for these American strikes, or in the alternative, that said reasons are purposefully discriminatory measured against any standard within the totality of the voir dire circumstances. Petitioner submits that the confusion of plausible additional reasons, distinguished from viable or alternative explanations, and the conceivability of shifting burdens, as well as explanations distinguished from reasons, relating to the venire facts in some degree of clarity, should be requisite for equal protection. This clarity from explanations, sensitive, intense inquiry related to the voir dire facts, within practical constraints of non-capital prosecutions, may require yet another degree of assurance for equal protection. Petitioner prays for relief of an American citizen's right to equal protection proclaimed by Amendment Fourteen to the Constitution of the United States of America. May it Please this Honourable Supreme Court of the United States.

For Andre Jenkins

No. 12-05-00208-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

ANDRE LEGALE JENKINS, § APPEAL FROM THE 241ST
Appellant

vs. § DISTRICT COURT

THE STATE OF TEXAS,
Appellee § SMITH COUNTY, TEXAS

MEMORANDUM OPINION

A jury convicted Appellant Andre Legale Jenkins of burglary of a habitation with the intent to commit aggravated assault and aggravated robbery. The jury also assessed punishment at sixty years of imprisonment and made a finding of a deadly weapon. Appellant raises five issues on appeal. We affirm.

BACKGROUND

Appellant was indicted for burglary of a habitation with the intent to commit aggravated assault and aggravated robbery. See TEX. PEN. CODE ANN. § 30.02 (a)(1) (Vernon 2003). Appellant pleaded "not guilty," and the matter proceeded to a jury trial. The evidence showed that Willie Crumpton was asleep on the couch in his cousin's front room about eight or nine o'clock in the morning when Appellant entered the house uninvited. Appellant grabbed Crumpton's neck from behind. Appellant then hit Crumpton with his fist and threatened him with a large knife. Appellant rummaged in Crumpton's

pockets demanding money and drugs. Crumpton struggled free of Appellant's grasp on his neck, arose, and turned to face Appellant. Appellant continued gesturing menacingly at Crumpton with the "large . . . saber-like knife" and demanding money. Crumpton said the knife did not come from his cousin's house.

Crumpton's cousin was awakened by the commotion. She came into the living room, which distracted Appellant and allowed Crumpton to run to the house next door to seek help. Appellant followed him and continued to menace him with the knife. Crumpton testified that he was afraid Appellant would cut him with the knife, and was concerned that Appellant could kill him. After threatening Crumpton for several minutes in the yard, Appellant left with his wife, who had been outside, and walked back to his parents' house. Crumpton said he recognized Appellant because he had seen Appellant and his wife in the neighborhood. After the police arrived, they took Crumpton to Appellant's parents' house, and Crumpton identified Appellant, who was standing in a large crowd of people.

The jury found Appellant guilty of burglary of a habitation with the intent to commit aggravated assault and aggravated robbery as charged in the indictment and sentenced him to sixty years of imprisonment. The jury also made an affirmative finding of a deadly weapon. This appeal followed.

BATSON MOTION

In his first issue, Appellant complains that the trial court erred in denying his *Batson*[1] motion. Specifically, he contends that the State engaged in purposeful discrimination by using its

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1 *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

peremptory challenges to excuse four black venire members who are within the strike line and, when this conduct was challenged, did not provide race neutral explanations for its actions.

Applicable Law

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids a prosecutor from challenging potential jurors solely on the basis of their race. U.S. CONST. amend. XIV; *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719.[2] A defendant who makes a *Batson* challenge must first make a prima facie showing that the prosecutor has used a peremptory challenge to remove a potential juror on account of race. *Purkett v. Elem.*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). A defendant may establish a prima facie case solely on evidence concerning the prosecutor's exercise of peremptory challenges at trial. *Batson*, 476 U.S. at 96, 106 S.Ct. at 1723. To establish such a case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[3] He must also show that these facts and any other relevant circumstances raise an inference that the

2 The Texas Legislature codified the *Batson* rule in Article 35.261 of the Texas Code of Criminal Procedure, but Appellant does not present a specific claim under that article.

3 In *Batson*, the Supreme Court reaffirmed that racial discrimination in the use of peremptory challenges denies a defendant the equal protection of the law guaranteed by the U.S. Constitution. *Batson*, 476 U.S. at 85, 106 S.Ct. at 1716. Since that time, the issue of discrimination in the use of peremptory strikes has also come to be understood in terms of a denial of the equal protection rights of prospective jurors. *See* Powers v. Ohio, 499 U.S. 400, 409-11, 111 S.Ct. 1364, 1370-71, 113 L.Ed 2d 411 (1991). Furthermore, the cognizability of discrimination in the jury selection process has been extended to categories beyond race. *See, e.g.*, Guzman v. State, 85 S.W.3d 242, 245-46 (Tex. Crim. App. 2002) (recognizing that Batson claim may be brought to challenge discriminatory exclusion of jurors on the basis of gender or ethnicity). Because Appellant brings a claim only under *Batson* and because he and the jurors who were struck are of the same cognizable racial group, we apply the *Batson* standard.

prosecutor used that practice to exclude the venire members from the jury on account of their race. *Id.*

Once a defendant has made a prima facie showing, the burden shifts to the state to come forward with a race neutral explanation for challenging the venire members. *Id.*, 476 U.S. at 97-98, 106 S.Ct. 1723-24. If the state offers race neutral reasons for the strikes, the defendant is afforded the opportunity to rebut those explanations. *Shuffield v. State*, 189 S.W.3d 782, 785 (Tex. Crim. App. 2006). The defendant carries the burden to prove purposeful discrimination. *Id.* The trial court then will have the duty to determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 97-98, 106 S.Ct. at 1723-24.

Although a prima facie case of discrimination can be supported by the differential of strikes made by the prosecution among various races and ethnic groups, the critical step in the analysis of a Batson challenge is the prosecutor's reason for any disparate striking of potential jurors based on similar responses to questions posed to the venire panel. See Miller-El v. Dretke, 545 U.S. 231, 241, 125 S.Ct. 2317, 2325, 162 L.Ed 2d 196 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."). The credibility of the prosecutor's reasons for disparate striking of jurors can be measured by, among other factors, "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell,* 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003).

We will only disturb a trial court's ruling on a Batson motion if it is "clearly erroneous." *Guzman v. State*, 85 S.W.3d 242, 254 (Tex.Crim.App. 2002). Generally, a fact finder's decision is clearly erroneous when it leaves an appellate court with a "definite and firm conviction that a mistake has been committed." Id. (citing *United States v.*

Fernandez, 887 F.2d 564, 567 (5th Cir. 1989)). The clearly erroneous standard is an especially rigorous one where the findings are based primarily on oral testimony and the trial judge has viewed the demeanor of the witnesses. *Fernandez*, 887 F.2d at 567; *see also Alexander v. State*, 866 S.W.2d 1, 8 (Tex.Crim.App 1993).

We review the evidence in the light most favorable to the trial court's ruling and afford great deference to that ruling. Jasper v. State, 61 S.W.3d 413, 422 (Tex.Crim.App. 2001). Furthermore, a claim that the proffered race neutral reasons for strikes are pretextual presents a question of fact, not law, and the trial court is in the best position to evaluate such claims. *Gibson v. State*, 144 S.W. 530, 534 (Tex.Crim.App. 2004).

Application of Law

At the Batson hearing, Appellant pointed out that the State struck venire members[4] number 8 (Ryder), number11 (Reed-Towels), number 15 (Wallace), and number 19 (Allen), and stated that those persons were the only black members of the venire panel. The prosecutor responded that he had struck all who chose rehabilitation as the primary consideration in sentencing.

Venire Member Ryder. The prosecutor noted that Ryder said "rehab" was the primary consideration in sentencing. A venire member's belief that rehabilitation is the primary consideration in punishment may be a race neutral reason for the use of a peremptory challenge. *Victor v. State*, 995 S.W.2d 216, 222 (Tex.App.-Houston [14th Dist.] 1999, pet. Ref'd) (citing *Adanandus v. State*, 866 S.W.2d 210, 224-25 (Tex.Crim.App. 1993)). Appellant countered that Caucasian venire member number 2 (Atwood), venire member number 3 (Stephenson), and venire member number 4 (Davis) also indicated a preference for rehabilitation. Atwood said, "(I)t

4 It is difficult to follow the discussion of which venire members responded in a certain manner and which were actually chosen for the jury because the attorneys sometimes identified the venire members by number and sometimes by name. Neither a jury list nor a juror strike list is included in the record. These lists would include both the names and the numbers of the venire members.

depends on the situation, but if rehab is not going to do the job, then punishment should be done." Stephenson said, "I believe if they're being rehabilitated, but being punished at the same time, both of them." Davis said, "I think it completely depends on the situation, and I just - - I guess I would have to go with punishment in the end, but I'd rather go with rehabilitation first." As compared with Ryder's unequivocal "rehab," the responses of the other three are less absolute, and each discussed the merits of punishment as a consideration. Thus, Ryder's answer is distinguishable from the answers of several venire members who were not struck, but who, according to Appellant, gave answers similar to Ryder's.

Further, the prosecutor proffered additional explanations for not striking those three venire members. Atwood had been the victim of a burglary, which was the charged offense in Appellant's case. Stephenson's brother had been treated "very" fairly by law enforcement and the legal system when he had been arrested. Davis's husband had been a juror in a previous case. Each of these additional explanations revealed further insights into the prosecutor's evaluation of these venire members as prospective jurors, and are additional race neutral explanations for striking Ryder but not Atwood, Stephenson, and Davis.

Venire Member Reed-Towels. The prosecutor's explanation for striking venire member Reed-Towels was that she said she needed more information to determine which was the more important sentencing consideration, rehabilitation or punishment. Failure to answer questions is a race neutral explanation for use of a peremptory challenge. Ester v. State, 151 S.W.3d 660, 662 (Tex.App.-Waco 2004, no pet.).

Venire Member Wallace. The prosecutor explained that venire member Wallace was the only person on his row who did not initially raise his card after the sentencing question was asked and had to be called upon for a response. Further, the prosecutor stated that Wallace "never gave an answer to whether or not [sentencing] was for punishment or rehabilitation." When called on by the prosecutor, Wallace responded that it "depend[ed] on what's the case, what he's

charged with."

Failure to answer questions has been held to be a race neutral explanation for use of a peremptory challenge. *Ester*, 151 S.W.3d at 662. Inattentiveness is also a race neutral reason for exercising a peremptory challenge. *Yarbrough v. State*, 983 S.W.2d 352, 357 (Tex.App.-Fort Worth 1998, no pet.); Moore v. State, 811 S.W.2d 197, 199 (Tex.App.-Houston [1st Dist.] 1991, pet. ref'd).

Venire Member Allen. The prosecutor explained that he struck venire member Allen because she knew one of the witnesses in the case, Appellant's mother, and her daughter is related to Appellant's family. A venire member may be peremptorily challenged because she is acquainted with a defendant or his family. *Thornton v. State*, 925 S.W.2d 7, 11 (Tex.App.-Tyler, 1994, pet. ref'd).

Having reviewed the entire record, we conclude that the trial court's decision to overrule Appellant's Batson motion was not clearly erroneous. Even if a prima facie case of racial discrimination was established, the prosecutor provided race neutral explanations for his use of peremptory challenges, and Appellant failed to carry his burden of persuasion on the issue. See Yarbrough, 983 S.W,2d at 357 ("In the absence of evidence in the record to rebut the State's race-neutral explanation, we will not disturb the trial court's finding that the State's explanation was legitimate."). Therefore, Appellant's first issue is overruled.

DENIAL OF MOTION FOR NEW TRIAL-NEWLY DISCOVERED EVIDENCE

In his second issue, Appellant argues that the trial court erred in denying his motion for new trial on the basis of newly discovered evidence, an alleged eyewitness. He states the issue as follows:

The trial court erred in denying Appellant's Motion for New Trial because of newly discovered evidence of an eye witness [sic] who was with the complainant and the Appellant the entire night before the crime & [sic] present during the burglary of habitation with intent to commit aggravated

robbery and aggravated assault, unknown to attorney, not due to lack of diligence, admissible evidence nothing like the trial evidence but meshing with trial evidence in such materiality, it will probably cause a different result if a new trial is ordered, infringing upon Appellant's right to a jury trial, right to present witnesses and testimony in his behalf, cross examine witnesses against him, & [sic] right to assistance of counsel under the United States And Texas Constitutions. U.S. CONST. amend. VI; TEX. CONST. Article I, § 10; TEX. CODE CRIMINAL PROC. ANN. art. 40.001; (Clerk Rec. pg. 96, Ground One, Motion New Trial).

Waiver

An appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX.R.APP.P. 38.1(h). Further, state and federal constitutional issues should be argued separately, with authority and argument related to the individual protections offered by each constitutional right, "with separate substantive analysis or argument provided for each ground." *Coggin v. State,* 123 S.W. 3d 82, 87 (Tex.App.-Austin 2003, pet. ref'd) (citing *Muniz v. State,* 851 S.W.2d 238, 251 (Tex.Crim.App. 1993); *Heitman v. State,* 815 S.W.2d 681, 690-91 n.23 (Tex.Crim.App. 1991)). Appellant wholly failed to state the legal basis for the constitutional issues he identifies, cite applicable case law, or develop the legal arguments supporting his assertion that the named rights were violated. We decline to make Appellant's argument
s for him. *See Muniz,* 851 S.W.2d at 252. Therefore, Appellant's constitutional issues are waived. However, we will address the merits of the argument Appellant actually made and supported with case law; whether the trial court erred in denying Appellant's motion for new trial based on newly discovered evidence, a witness named Kent Towels.

Newly Discovered Evidence

Appellant asserts that he should have been granted a new

trial because of a newly discovered eyewitness, Kent Towels. Appellant contends that his counsel did not know about Kent Towels prior to trial, and that Towels testimony is counter to the testimony of Crumpton, the victim.

A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial. TEX. CODE CRIMINAL PROC. ANN. art. 40.001 (Vernon Pamph.Supp. 2006). A defendant is entitled to have his motion for new trial granted if he shows that (1) the newly discovered evidence was unknown to him at the time of trial; (2) his failure to discover the new evidence was not due to his lack of due diligence; (3) the new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and (4) the new evidence is probably true and will probably bring about a different result in a new trial. Wallace v. State, 106 S.W.3d 103, 108 (Tex.Crim.App. 2003). A defendant is not entitled to a new trial on the ground of newly discovered evidence when the evidence was that of which he was aware but failed to obtain by subpoena. Drew v. State, 743 S.W.2d 207, 227 n.16 (Tex.Crim.App. 1987). Nor is the defendant entitled to a new trial when he had knowledge of the evidence, but failed to communicate it to his attorney. Id. At 227 n.14.

The trial court has discretion to decide whether to grant a new trial based upon newly discovered evidence, and its ruling will not be disturbed absent an abuse of discretion. Keeter v. State, 74 S.W.3d 31, 37 (Tex.Crim.App. 2002). Where, as here, the trial court conducts a hearing on a motion for new trial, the trial judge is the trier of fact and the sole judge of witness credibility. Woodall v. State, 77 S.W.3d 388, 393 (Tex.App.-fort Worth 2002, pet. ref'd).

Towels did not testify at the hearing on the motion for new trial, but his affidavit was admitted into evidence at the hearing. Towels states in his affidavit that he was peeking through Crumpton's front door when Appellant attacked Crumpton, but left while Appellant was still in Crumpton's

house. According to Towels' affidavit, he would have testified that (1) he, Appellant, and Crumpton were together the night before the burglary, (2) Appellant obtained the knife he used against Crumpton while the three were together, (3) the knife was Crumpton's knife, (4) Appellant entered the house, (5) a sleeping child was on Crumpton's chest when Appellant entered the house, and (6) Appellant struck Crumpton in the face during the burglary, but did not take out the knife or threaten Crumpton with it while Towels was watching.

Generally, Towels' affidavit supports the State's allegations that Appellant entered Crumpton's house and assaulted him. His statement that the knife belonged to Crumpton relates to a collateral matter and not to an element of the offense. Towels' statement that he, Crumpton, and Appellant had been together the night before the burglary serves only to impeach Crumpton's testimony that he did not know Appellant well. Towels' statement that Appellant did not take out the knife or threaten Crumpton with it while Towels was watching is inconsistent with Crumpton's trial testimony regarding Appellant's use of the knife. The trial court reasonably could have resolved this inconsistency in favor of the State. The trial court also reasonably could have concluded that Towels' testimony, if admitted, would not bring about a different result in a new trial.

Appellant knew that Towels lives across the street from Crumpton and, according to the affidavit, went to Towels' house looking for Crumpton immediately before the burglary. Appellant does not assert that Towels was unavailable or missing before the trial. Yet, Appellant did not tell his counsel about Towels, make any pretrial attempt to learn what Towels knew about the incident, or subpoena him for trial. Consequently, the trial court reasonably could have concluded that Appellant did not use due diligence in discovering that Towels was an eyewitness.

The record supports the trial court's conclusion that Appellant did not show himself entitled to a new trial because

of newly discovered evidence. Therefore, the trial court did not abuse its discretion in denying Appellant's motion for new trial on that ground. Appellant's second issue is overruled.

DENIAL OF MOTION FOR NEW TRIAL DUE-COMPETENCE TO STAND TRIAL

In his third issue, Appellant argues that the trial court erred in denying his motion for new trial because

Appellant was not competent to stand trial while unable to assist his attorney by conveying crucial facts in trial preparation & [sic] unable to comprehend the ramifications of testimony against him during trial, infringing upon Appellant's right to present evidence in his behalf & [sic] cross examine witnesses against him in a jury trial, right to assistance of counsel, right to due process of law & [sic] equal protection of the law under the United States and Texas Constitutions, &[sic] Code Of Criminal Procedure Of Texas. U.S. CONST. amends. V, VI, XIV, § 1; TEX.CONST. art. I, § 10; TEX. CODE CRIMINAL PROC.ANN.arts.46B.003,46B.024(1) (A).

As previously discussed, an appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX.R.APP.P. 38.1(h). In support of this multifarious issue, Appellant cites only one case, Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903 43 L.Ed.2d 103 (1975), for the principle that a defendant's mental condition may impact his due process right to a fair trial. Contrary to the requirement of Rule 38.1 (h), Appellant has cited no authority supporting his argument that Appellant was incompetent to stand trial. Consequently, this issue is waived. However, even had Appellant not waived this issue, the result would not change.

Prior to trial, Appellant's attorney raised the issue of competence. The trial court ordered Appellant examined by a licensed psychiatrist, Dr. Tynus McNeel. Dr. McNeel examined Appellant and concluded that he was competent to

stand trial. Dr. McNeel filed a report of his findings with the court prior to trial. At the hearing on the motion for new trial, Appellant called as his witness on the issue of competence a licensed chemical dependency counselor.

Specifically, Appellant called the counselor to testify regarding an interview he had with Appellant two months before the date of the charged offense. The State objected and contended that a licensed chemical dependency counselor was not qualified to testify as to Appellant's competence to stand trial. The trial court sustained the State's objection.

A person who testifies as an expert on a defendant's competence to stand trial must be a licensed psychiatrist or psychologist and meet an extensive list of requirements. *See* TEX. CODE CRIM. PROC. ANN. Arts. 46B.021, 46B.022 (Vernon Pamph. Supp. 2006). In this case, the licensed chemical dependency counselor testified about his qualifications, which did not meet the requirements of Article 46B.022. Therefore, he was not qualified to testify as an expert on Appellant's competence. *See* id., art. 46B.022. Further, the evaluation he performed on Appellant occurred two months prior to the offense. Having failed to meet the requirements necessary to testify as an expert on Appellant's competence, the trial court did not err in sustaining the State's objection to the counselor's testimony. Since there was not competent evidence adduced by Appellant on this issue, the trial court did not err in denying Appellant a new trial based on Appellant's alleged incompetence to stand trial.

Appellant's third issue is overruled.

MOTION NEW TRIAL-EXCLUSION OF EVIDENCE In his fourth issue, Appellant contends the trial court erred at the hearing on the motion for new trial in sustaining the State's objections to the testimony of the licensed chemical dependency counselor regarding his diagnosis and treatment of Appellants "dual diagnoses of suffering from drug dependency

disorder and a mental health condition."[5]

As stated above, an appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX.R.APP.P. 38.1(h). Because Appellant has failed to make any legal argument or include appropriate citation to authorities, he has waived the issue. *Muniz*, 851 S.W.2d at 251; *Heitman*, 815 S.W.2d at 690-91 n. 23; *see also* TEX.R.APP.P. 38.1(h).

In an attempt to show that he was not competent to stand trial, Appellant wanted the licensed chemical dependency counselor to testify about his diagnosis and treatment of Appellant. As we noted in our discussion of Appellant's third issue, Appellant failed to establish that the counselor was qualified to testify as an expert on the issue of Appellant's competence. The trial court permitted the counselor to testify on a bill of review, which is included in the appellate record in this case. Nothing in the bill of review persuades us that the trial court erred in sustaining the State's objections to the testimony.

Appellant's fourth issue is overruled.

MOTION FOR NEW TRIAL-JURY CHARGE ERROR

In his fifth and final issue, Appellant contends the trial court erred in denying the motion for new trial because of an erroneous jury instruction. Appellant's issue is inadequately briefed, containing little relevant case law. Therefore, Appellant has waived this issue on appeal. Further, Appellant complains of jury charge error, but failed to object to the charge of which he now complains.

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5 Appellant cited one case in this issue, *Taylor v. State*, 163 S.W.3d 277, 281 (Tex.App.-Austin 2005, pet. dism'd), which stands for the principle that a motion for new trial is not necessary to raise as issue on appeal. No cases were cited in support of the admissibility of the testimony of the licensed chemical dependency counselor.

Appellant maintains that the omission of the phrase "as charged in the indictment" from the sentence "If you do no so find, or if you have a reasonable doubt thereof, you will find the defendant "Not Guilty" of burglary of a habitation "was structural error. This structural error, his argument continues, "could very well have been a factor in the jury coming back with a verdict of guilty. . . ." To obtain a reversal in the absence of an objection to a jury charge, Appellant must establish that the jury instruction of which he belatedly complains resulted in "egregious harm" to him at trial. Almanza v. State, 686 S.W.2d 157, (Tex.Crim.App. 1985) (op.on reh'g). However, Appellant presents nothing more than a supposition without the benefit of supportive case law. Therefore, he has failed to comply with Rule 38.1(h), see TEX.R.APP.P. 38.1(h), and we decline to make his argument for him. See Muniz, 851 S.W.2d at 252. Accordingly, Appellant has waived his fifth issue.

Appellant's fifth issue is overruled.

DISPOSITION

Having overruled Appellant's five issues, we affirm the trial court's judgment.

SAM GRIFFITH
Justice

Opinion delivered October 25, 2006.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(DO NOT PUBLISH)